

Principles of Constitutional Design

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In every instance, some of the power that a “pure” parliament would have for enacting majority will is separated from parliament and given to some entity that is to a greater or lesser degree separated from parliament. The net result is to produce an average separation of powers for parliamentary systems that is close to the average for “presidential” systems. For this reason, we will subsume all means of slowing down, channeling, or thwarting majority will under “separation of powers.”

Four Historical Patterns of Devolution from One-Man Rule

What we now call separation of powers rested historically on a devolution of power away from strong-man rule – whether called a king, emperor, pharaoh, or what have you. This devolution proceeded along one or more of the following paths from one political system to another.

1. Popular consent: Using cultural and/or political institutions to limit the center of power to a range acceptable to “public opinion.”
2. Separation of functions: Dividing power among multiple more or less specialized and independent entities or offices.
3. Representation: Creating an elective body to share the exercise of power with the central governing agent, who now becomes an “executive.”
4. Federalism: Moving significant power away from the center to other, more local arenas of decision making.

These four historical movements eventually developed into the two great principles of Popular Sovereignty and the Separation of Powers, which together undergird and define modern constitutionalism.

As discussed earlier, popular sovereignty rests on the dual impulse for popular control and for limiting that popular control. What was identified earlier as popular consent is the most “primitive” form of the impulse for popular control. As this impulse matures historically and is institutionally codified, it becomes popular control. When the institutions for popular control are in turn limited by other institutions, it becomes popular sovereignty. Elected bodies of representatives, separation of functions, and federalism are prominent among these limiting

institutions, and all are variations on the separation of powers. The second face of sovereignty thus implies separation of powers as part of the definition of popular sovereignty, and separation of powers will not occur without at least the most primitive impulse for popular consent, as characterized by Bodin. The stronger the impulse for popular consent, the more it presses toward popular control, and the stronger and more comprehensive the counteracting impulse toward separation of powers becomes.

What we today call separation of powers is actually a blending of the separation of governmental functions and the sharing of governmental powers by the multiple entities that result from the separation of functions. The strongest and most pure form of popular control, an assembly of all the people in the same space, lacks the limits on power that define separation of powers and that thus define popular sovereignty. From the ancient world on, whether expressed in Plato's and Aristotle's disdain for unmixed democracy, or codified in Rousseau's general will, which attempts to avoid the injustice of merely totaling up private wills, simple popular control has had a bad odor in political philosophy. This reaction does not stem from a dislike of popular consent per se but from a recognition that pure, unlimited democracy is a return to rule by a single agent, only this time an assembly instead of a king. Although an assembly may be inherently superior to a king, it is still not a true sovereign until limited in some way, and therefore it poses significant risks. A central concern in Western political philosophy is the attempt to marry justice with power. The fundamental technology developed for accomplishing this we now term "constitutionalism," and constitutionalism rests on popular sovereignty, which requires some significant manifestation of separation of powers. The advent of a representative assembly to embody popular will is that minimum, significant level of separation of powers, which is why elections are usually the first thing that comes to mind when we think of what makes a government a democracy (more properly, a republic).

What we now term "representation" is an institution, or set of institutions, that separates the power of deciding who will be among the decision makers and places this power in the hands of people other than those who will have the power to actually make the collective decisions. So, for example, the same elite that might dominate the legislature cannot also decide who gets to sit in that legislature. Representation also

separates the function of judging the merits of the consequences of collective decisions from the function of making those decisions. This central and often overlooked form of separation of powers embodies the double requirement of the concept – a separation of functions coupled with a sharing of powers. Two distinguishable entities, the people and the elected body of representatives, neither of which can control the entire process of collective decision making on its own, share that power. Sharing power requires that we first divide power between two or more entities.

The British parliamentary system, which developed slowly and incrementally in this direction, sometimes serves as a prominent historical example that blurs the double thrust of separation of powers to the point where it is overlooked. The concept of parliamentary sovereignty, if taken literally, denies the existence of separation of powers. As long as Parliament was composed of a virtually self-selecting elite that was minimally connected to popular control, “parliamentary sovereignty” amounted to control by that elite or oligarchy. At some point, when the people gained the ability through universal suffrage to carry out its distinguishable functions of selecting and removing decision makers, at that point we had separation of powers and minimal *de facto* popular sovereignty. To the extent Parliament was viewed before 1689 as limiting the monarchy, to that extent Britain had a constitutional monarchy as opposed to the constitutional republic that is today the principle underlying parliamentarianism. The concept of king-in-parliament, by negating the earlier separation of powers between the monarch and aristocracy-dominated Parliament, potentially strengthened elite control. However, the Glorious Revolution also significantly broadened the elite to the point where it was no longer homogeneous but composed of competing elite factions. Also, the theoretical rationale for the Glorious Revolution used rhetoric that implied the potential inclusion of even a broader portion of the population. As a result, at some later point, British parliamentarianism evolved incrementally into modern constitutional democracy (republicanism) with the separation of powers between the people and parliament that we now take for granted as the hallmark of parliamentary government. That the shift was so incremental as to be almost invisible should not blind us to the reality of the distinction between constitutional monarchy, constitutional oligarchy, and constitutional democracy (republicanism) – all of them

were at one time or another the reality of what historically appears to be a continuous parliamentary system.

Federalism is a form of separation of powers, and thus constitutionally subsumed under it. At the same time, federalism is an independent theory of government that, when it is present in a political system, leads to significant differences in thinking about constitutionalism in general and separation of powers in particular. Much, if not most of what distinguishes American from British constitutionalism can be traced to the prominence of federal theory in the former. However, a fuller explication of this federal theory must be made elsewhere. For our present purposes, describing the level of separation of powers in a given political system, we treat federalism as part of a separation-of-powers paradigm.

To return to our discussion of separation of powers as a devolution of power away from concentration of political power in a single entity, the type of political system that results from the devolution depends to a certain extent on the agent carrying the impulse for devolution: the agent carrying the demand for devolution will tend to define “the people,” and thus citizenship, in terms of itself. Because the historical trend among constitutional polities was initially away from monarchy and toward parliamentary systems, and because historical political systems had different agents carrying the impulse for devolution, parliamentarism is not one thing but several. To clarify this, let us consider the historical tendencies in the devolution from monarchy.

If the agent for devolution is the many “poor,” as Aristotle would have it, the system will tend toward the ideal of a pure democracy where government resides in an assembly composed of all the citizens, as in ancient Athens. We can call this the “pure democracy model.” Numerical equality in the distribution of citizenship, political influence, goods, services, honors, offices, and duties is the hallmark of this tendency. Theorists also cite honesty, patriotism, and an inclination to the common good as important values, whereas others cite intolerance of minorities, a tendency toward homogeneity, and reduction of political discourse to the lowest common denominator as pathologies. Liberty tends to be defined in this instance in terms of the ability of the people as a whole to get what they want – that is, in communitarian terms. Popular elections and popular approval and amendment of constitutions

are some of the consequences of this tendency, as are popular initiative, referendum, and recall.

Originally, the agent for devolution of power was an elite of some sort, and for this reason we may term it the “elite model.” Initially there was a tendency toward the separation of executive decision-making functions as the preferred path for limiting power. The decision-making body, usually open to everyone with elite status and thus to a significant degree honorific, tended to be advisory vis-à-vis holders of political power. The precise nature of the regime depended on the criteria for membership in the elite – large landholdings, social status, contributions to the society, military prowess, knowledge and education, religious titles, or simply wealth. If one class of people dominated all or most of these possible criteria, the elite was “coherent,” as in late medieval England. If there were a number of avenues to full citizenship rights, and these avenues were used by different sectors of the population, then elite competition resulted, and competition among a fractured elite itself induced limits on the central power, as in the Austro-Hungarian Empire. Honor, proportional equality, territorial expansion, and competition for positions of privilege and honor concerned such agents of devolution from monarchy. Liberty was defined in this instance in terms of maintaining independence of will vis-à-vis the government and in terms of preserving the privileges of members of the elite class. Constitutional expressions of this tendency come down to us in the form of a privy council, cabinet, or other advisory committees to the king (or head of state); ministries or independent commissions that carry out duties or functions usually considered as part of a fully endowed head of state, such as the power to pardon; the requirement that certain major executive actions, such as making treaties, appointing people to major administrative posts such as attorney general, and selecting members of the judiciary be countersigned or approved by some independent body, such as a senate.

Related to the elite model, in which the representative body is essentially advisory or subordinate to the king, is another kind of elite model in which the representative body is actually at the center of power. We can term this the “cohesion model.” Post-1689 Britain, early modern Venice, the Iroquois Confederation, and the contemporary Iranian legislature may all be exemplars. In each instance an elite, based on landholding, commerce, virtue, and religious commitment, respectively, is

dedicated to preserving the social structure and the culture that underlies it. Politics is seen as the venue of political amateurs using informal as well as formal institutions of decision making. Stability is sought by emphasizing internal peace, often through the distribution of goods and services to alleviate the suffering of the nonelite classes in a way that elicits their continued support but does not threaten existing power relationships. The elected legislature is either the center of elite power, or the primary counterelite institution to induce pursuit of community rather than class goals. None of the four examples cited could be termed a democracy, although all might be called republics.

If the middle (bourgeois) class is the agent for devolution, the emphasis will be on representation *per se*. Not inclined to spend time away from personal economic pursuits, members of the dominant middle classes will select representatives to serve as agents much the way they will select lawyers and accountants to provide a service. The representatives are agents, not instructed delegates, whose function is to determine how best to achieve the broad needs and goals of the citizens – productivity in the sense of increasing gross national product, efficiency, economic liberty, and infrastructure development. These representatives are also supposed to guard against extremes of numerical equality (economic redistribution) and proportional equality (privilege). Liberty is defined in terms of the rule of law (especially in terms of equal and neutral juridical treatment) and the relative absence of coercion (especially with respect to economic matters). Constitutional expressions of this tendency include bicameralism, an independent judiciary, limited government (denying the competence of the government to interfere in certain areas), and bills of rights. This describes what could be called the “liberal model.”

Another type of parliament might be called the “general will model.” In this model the representative body is ideally seen as a mirror image of the larger population, including ideological divisions, such that it should act in ways identical to how the people would act if assembled in the same room. Representatives are viewed as delegates sent by the people to carry out their general will. Potential representatives align according to platforms of proposed legislation that they will in fact support unerringly and in detail if elected. Emphasis is on close control by the people through frequent elections by a very broad electorate. Large assemblies, the relative absence of legislative complexities

that might hide legislative intent or slow down popular will, open galleries, a free press, and detailed public minutes are hallmarks of this model. The relative absence of requirements that might restrict who can run for office, the provision of public funds for all candidates for office, term limits, automatic voter registration, and mandatory voting are also in line with this model. Originally, multimember districts and proportional representation were seen as key aspects of the delegate model, but empirically the results in this regard have been mixed. Some might prefer to term this the democratic model, but the next model could also be viewed as democratic since it attempts to respond to all of the people using many of the same democratic institutions but is structured differently to reflect and respond to a diverse population with differing characteristics, goals, and needs.

The final type of representative system might be termed the “common good model.” It is grounded in a view of representatives as delegates rather than as trustees, and bound more by general goals than by specific instructions. Platforms are considered more advisory and illustrative than binding. A legislator, like a lawyer hired to represent one in court, is supposed to be better at achieving the common good than the people using the agent, or else they would not have bothered to hire or send the agent in the first place. These legislative agents are seen more as policy entrepreneurs and brokers in the bargaining among various societal interests in a complex and ambiguous situation than as carriers of a general will. Unlike the previous model, where the preferred outcomes are assumed to be known at election time, the specific policies that will be in accord with the common good are seen to be largely unknown and subject to emerge through the deliberations of an assembly, where the representatives are not too closely tied to volatile public opinion. The common good model is more liberty-oriented than equality-oriented, a matter more of emphasis than anything else. One consequence is a greater use of legislative complexity in the organization of the institution so as to produce more “choke points” to be used by minorities in protecting their respective interests against majority coercion. This model is concerned more with producing legislation that is balanced, gives everyone something, and privileges solutions that increase the economic pie to everyone’s potential benefit rather than redistributing the pie. Ideological outcomes are frowned upon.

Therefore, the history of devolution away from one-man rule had three broad results:

1. Power centralized in a single person was replaced by power focused increasingly in an elected assembly.
2. This led to the creation of multiple types of representative models.
3. These multiple representative models developed varying degrees of separation of powers.

Parliamentarism versus Presidentialism?

If the history of the separation of powers led to several models of representative government, what about the presidential system that is supposed to be coterminous with separation of powers? The fundamental difference between parliamentarism and presidentialism is that the latter has a popularly elected executive who is not part of the legislative branch, whereas the former has an executive, usually termed a prime minister, who is selected by the parliament, sits in it, and leads it directly. Britain is usually cited as the exemplary home of parliamentarism, while the United States is usually cited as the exemplary home of presidentialism. The distinction between the two constitutional forms is indeed important, but categorization schemes that rest upon it are failing to account for most of the difference between the two, which is essentially one in the degree of the separation of powers.

Several recurring problems in comparative studies result from this approach. First, a minority of political systems appear to fall into simply one category or the other. This results in the creation of awkward and ambiguous middle categories often labeled “hybrid” or “mixed.” These middle categories hide more than they reveal about constitutional design. Second, by singling out the United States as the paradigm case of presidentialism, researchers fail to see that presidentialism is not the major defining characteristic of the American political system. Invariably, on most empirical measures, the United States is a polar opposite to the British system, so it is reasonable to conclude that presidentialism is the cause of the difference. However, students of American politics will readily note that strong bicameralism, federalism, and an independent court together constitute most of what